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I. INTRODUCTION

It is no wonder that people worry about the Fourth Amendment exclusionary rule. If judges actually enforce the rule, unpleasant consequences follow. In some number of cases, application of the exclusionary remedy requires suppression of probative evidence. As a result–some prosecutions are weakened or lost and some criminals escape punishment–at least for the moment.

I cannot imagine that many people (other than criminals and their cohorts) are happy when evidence of guilt is suppressed. And no serious person is pleased when people guilty of committing serious crimes avoid punishment.

Given the exclusionary rule's effects, it is inevitable that we will continue to question its efficacy, and part of that inquiry requires us to evaluate the strength of the justifications for the rule. What is not inevitable, however, is that this inquiry ignores the actual reasons that judges adopted the exclusionary rule in the first place. In recent years, judges and commentators alike have measured the rule's efficacy against a justification that had little–if any–significance in the Supreme Court's seminal opinions adopting the exclusionary rule.

These commentators, including Professors L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase, and Ronald W. Fagan (Pepperdine Study),[1] assume that the primary, and perhaps sole, justification for the exclusionary rule is deterring police misconduct.[2] I believe that this is a mistake–and an important one–because this is a task for which the exclusionary remedy was not intended, and one for which it is very poorly suited.

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1. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1998).

2. *See id.* at 672-73.

It is understandable that those familiar only with the Supreme Court's recent exclusionary rule jurisprudence would make this mistake. After all, the Supreme Court's recent opinions assert that deterring police misconduct is the exclusionary rule's sole justification.[3] These recent opinions generally rest on an interrelated set of propositions: (1) the exclusionary remedy is merely a judge-made rule of evidence and not an essential element of the rights protected by the Fourth Amendment; (2) the exclusionary remedy is directed at police officers, not judges, and can only be justified to the extent that it deters police officers from violating the Constitution; (3) the rule's success as a deterrent is essentially an empirical question that can be answered by "balancing" the rule's costs against its deterrent benefits in a particular setting; (4) similarly, the rights protected by the Fourth Amendment can be treated as mere interests to be balanced against competing government claims of authority; and (5) although unlawful searches and seizures violate the Fourth Amendment, using items obtained from those illegal searches as evidence does not.[4]

This particular grouping of ideas is a relatively recent development in Fourth Amendment theory and parallels the emergence of pragmatist ideas in this area of constitutional theory.[5] For example, interest balancing to achieve instrumental goals exemplifies how pragmatist ideas have come to dominate constitutional doctrine in the last thirty years. Space limitations here preclude a detailed study of that process, or the emergence of the deterrence rationale in the exclusionary rule debate, or even the narrower topic of how the deterrence rationale has been championed by those who wish to limit or even eliminate the remedy of suppression. Fortunately, others have already explored these important subjects in lengthy and detailed studies.[6]

The deterrence rationale that holds sway in recent opinions was not a justification relied upon by the Supreme Court in its seminal decisions adopting the exclusionary rule. The thesis that deterrence of police misconduct was a

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3. The Pepperdine Study does give a passing nod at the other justifications for the rule: "Of course, the rule was intended not only to deter police misconduct but also to ensure judicial integrity by not permitting courts to consider the fruits of illegal police conduct." *See id.* at 672 (citing Mapp v. Ohio, 367 U.S. 643, 659 (1961)).

4. For classic discussions of this position, see United States v. Leon, 468 U.S. 897, 916-20 (1984); United States v. Calandra, 414 U.S. 338, 347-58 (1974).

5. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200-04 (1993).

6. For discussions of the emergence of balancing in constitutional doctrines, see Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For detailed analyses of the emergence of the deterrence rationale, see Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); *see also Calandra*, 414 U.S. at 355-62 (Brennan, J., dissenting).

fundamental justification for the exclusionary rule was not articulated by the Supreme Court until mid-century, and this argument was pressed by the Justices who opposed imposing the exclusionary rule upon the states.[7] It would be another quarter century before the Supreme Court would fully deploy the technique of treating deterrence as the sole justification–and once again it was used as a device for limiting the application of the exclusionary rule.[8]

Obviously, the Supreme Court's recent decisions declaring that deterrence rationale is the only justification for the exclusionary remedy must be central to any critique of the current state of the law. Nonetheless, I suggest that our analysis should not stop there. For whatever the merits of this deterrence theory, it does not explain why the Supreme Court adopted the exclusionary rule or imposed it upon the states.

The Supreme Court's actual justifications for these opinions would seem to be of great interest to those trying to evaluate the rule's effectiveness. I do not mean to suggest that the law of the Fourth Amendment is or should be frozen at some time in the past. The relevant years here are 1886, 1914, and 1961, and no one could seriously propose that our constitutional jurisprudence has not changed dramatically in the intervening decades. I do mean to suggest, however, that if we ignore the actual justifications announced in the Supreme Court's decisions adopting the rule, we will understand neither the rule's legitimate functions nor the instrumental purposes for which it can be effectively deployed.

Supreme Court Justices adopted the exclusionary rule for several reasons. First, and most notably, they acted to enforce individual rights. The Supreme Court's seminal opinions adopting the exclusionary rule were rooted in a respect for the fundamental nature of the rights protected by the Fourth Amendment. Recent Supreme Court opinions, including those advocating the deterrence rationale, often treat these rights as mere interests easily outweighed by government policy objectives. In contrast, the Court's seminal opinions adopting the exclusionary principle treated Fourth Amendment rights as essential constitutional privileges that helped define the very nature of the relationship between citizens and their government, rights that must be honored by all relevant government actors. These opinions focused upon the nature and scope of privacy, property, and liberty rights; upon the means of enforcing those rights for the individual claimant; and rarely even mentioned the deterrence of police misconduct as a relevant topic.

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7. *See* Wolf v. Colorado, 338 U.S. 25, 30-31 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1971); Kamisar, *supra* note 6, at 601-06; Schrock & Welsh, *supra* note 6, at 269.

8. *See Calandra*, 414 U.S. at 345-46; Kamisar, *supra* note 6, at 638-40; Schrock & Welsh, *supra* note 6, at 251-54.

Second, the exclusionary principle allowed judges to craft a remedy appropriate to the parties in the litigation before them, which was usually a criminal prosecution brought by the state against individual defendants.[9] Other available remedies required separate proceedings, and typically would be directed at police officers who were not parties to the criminal case between government and citizens. A classic example was the trespass suit seeking civil damages. This remedy was available only if the civil claimant, typically the defendant in the criminal case, maintained separate judicial proceedings in which the named defendants usually would be police officers.

Third, suppressing illegally obtained evidence was a remedy that judges controlled. They could apply the remedy within the context of cases being litigated before them without being dependent upon the actions of other branches of government. Other actors in the justice system (prosecutors, police departments, and juries) controlled the application of other possible remedies.

In short, the exclusionary rule embodied judicial review of the acts of the other branches of government–particularly the executive branch–and therefore allowed federal judges to fulfill their constitutional function of protecting individual rights against the improper exercise of power by the other branches of government.[10] The exclusionary rule implemented constitutional judicial review in the Fourth Amendment context, and that is what the Justices who adopted the remedy intended.

My focus in this Article is not to parse the data produced by the Pepperdine Study to support its authors' arguments for an administrative tribunal to resolve most search and seizure disputes.[11] Instead, I will examine the justifica-

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9. This rationale is consistent with the premise underlying the famous passage in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): "'[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'" *See id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

10. For the reader interested in comparing the discussion of judicial review in these cases with Chief Justice Marshall's famous assertion of the power, see *Marbury*, 5 U.S. (1 Cranch) at 177-79; *see also* THE FEDERALIST NO. 78, at 465-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. My general criticism of the manner in which contemporary judicial and academic discourse focus upon the deterrence rationale should not detract from the praiseworthy attributes of the Pepperdine Study. The study provides a useful survey of earlier attempts to measure the exclusionary rule's effects. *See* Perrin et al., *supra* note 1, at 678-711. The original empirical research conducted by the Pepperdine Study is in some important ways more ambitious than many earlier projects attempting to quantify the exclusionary rule's effects. In particular, the study questions a larger sample of law enforcement officials than did many earlier studies. *See id.* at 712. The authors even acknowledge some of the limitations of their own study. *See id.* at 727. Because I believe that the foundational premise of the project is flawed, my primary concern here is not with how much the Pepperdine Study data tells us about the exclusionary rule's adequacy as a deterrent of government lawbreaking. If we were to accept the study's premise, however, the study raises some tantalizing topics for analysis and discussion. One could easily devote an entire paper to an examination of the study's empirical research. For example, it would be interesting to explore the methodological criticisms the study has of other empirical studies, and then try to determine whether it has succeeded in avoiding the flaws apparent in earlier studies. One area of inquiry might be to study how researcher bias influences

tions offered by the Supreme Court in its seminal opinions defining and implementing the exclusionary principle. Ultimately, this discussion calls into question the underlying premise upon which the Supreme Court's recent decisions rest.

II. JUDICIAL REVIEW AND THE EXCLUSIONARY RULE

The notion that deterring police misconduct is the only–or even the primary–justification for the exclusionary rule is both a recent innovation in constitutional theory and a misreading of the justifications offered by the Supreme Court in its leading decisions imposing the exclusionary rule upon both federal and state actors. The seminal opinions adopting the exclusionary remedy were issued over a period of seventy-five years, yet they demonstrate a remarkable continuity in theory. In each of the Supreme Court's leading opinions, the central objective was to craft a judicially enforceable remedy that could be imposed upon the government when its agents violated the rights of individuals. Deterring police misconduct was at most a peripheral concern. To understand how far the Court's current doctrine has drifted from its original justifications for the exclusionary rule, it is necessary to examine carefully both the reasoning and the language of these opinions.

The Supreme Court first laid the groundwork for a Fourth Amendment exclusionary rule more than a century ago in *Boyd v. United States*.[12] The Court

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their interpretation of the data. For example, the Pepperdine Study reports that large majorities of the law enforcement officers who responded to their questionnaire believed that the exclusionary rule did deter police misconduct. *See id.* at 720-21. One plausible interpretation of these data is that the police officers' responses demonstrate that the exclusionary rule is a successful deterrent. The authors of the Pepperdine Study, on the other hand, conclude that these data prove that the exclusionary rule is a failure as a deterrent. *See id.* at 734. To resolve this dichotomy would require some test for defining the level of compliance that constitutes a success. No reasonable researcher would expect any legal rule to produce 100% compliance in the real world. Ultimately, even this may be a futile inquiry, for the authors of the Pepperdine Study are attempting to quantify what are essentially questions of political values. Their failure to produce a measure of success is understandable and inevitable, and highlights both the limitations inherent in this kind of research and the importance of maintaining a healthy skepticism when we analyze the results reported.

Similarly, the authors' proposal for an administrative tribunal raises a number of interesting topics. It is worth noting that proposals for using administrative processes to deal with the constitutional issues raised by searches and seizures have been offered by distinguished commentators for more than 30 years. *See generally* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990) (advocating police rulemaking); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (discussing the creation of legislative or police made rules); Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964) (suggesting an independent review body in lieu of suppression).

12. 116 U.S. 616 (1886).

held that a judicial subpoena ordering a business to produce shipping invoices violated the Fourth Amendment.[13] The Boyds had complied with the subpoena, albeit under protest, and this enabled the government to review the disputed business records to obtain information for use in a civil forfeiture action.[14]

As a result, the Court's decision holding that enforcement of the subpoena violated the Constitution was functionally a suppression order.[15] Its effect was to prevent the government from using the facts it had learned by reading the subpoenaed documents as evidence in a judicial proceeding.[16]

The Supreme Court's focus was not upon deterring misconduct by law enforcers. Instead, the Court focused upon the nature of the rights protected by the Fourth and Fifth Amendments, and upon the judicial duty to enforce rights against even the mildest forms of overreaching by the executive and legislative branches.[17] The legislatively authorized subpoena used by the executive branch to gain access to the Boyds' private papers was not a literal search and seizure.[18] Nonetheless, the Justices exercised the power of judicial review to enforce the constitutional right not to have the contents of these papers used as evidence in judicial proceedings the Court treated as quasi-criminal.[19]

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.[20]

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13. *See id.* at 638. The Supreme Court held that the enforcement of the subpoena violated the Fourth and Fifth Amendments. *See id.* For a more detailed discussion of the *Boyd* case, see Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573-81 (1996).
14. *See Boyd*, 116 U.S. at 618.
15. *See id.* at 638.
16. *See id.*
17. *See id.* at 625-27.
18. *See id.* at 624, 630.
19. *See id.* at 621-22, 633-34.
20. *Id.* at 635 (first emphasis added).

In this passage, the Court outlined its justifications for preventing the other branches of government from compelling production of documentary evidence to be used against the Boyds. In our constitutional system, judges have the duty of exercising the power of judicial review to prevent the legislative and executive branches from transgressing protected rights. The *Boyd* Court concluded that enforcement of the federal statute violated rights protected by the Fourth and Fifth Amendments, rights that are fundamental to the democracy.[21]

The *Boyd* Court addressed two interrelated dimensions of the rights protected by the Fourth and Fifth Amendments.[22] The first was the privilege not to have the government intrude upon protected rights.[23] The second was the right not to have evidence obtained in violation of those rights used as evidence against the citizen.[24] In a frequently quoted passage, the Supreme Court linked these two faces of protected constitutional rights. Referring to Lord Camden's famous opinion in *Entick v. Carrington*,[25] the Supreme Court stressed:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, . . . they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,–it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other.
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> Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures?[26]

In this passage, the Supreme Court treated the rights not to have some private property seized or used as evidence as essential attributes of these constitutional privileges. As

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21. *See id.* at 638.
22. *See id.* at 635.
23. *See id.* at 621.
24. *See id.* at 622.
25. 95 Eng. Rep. 807 (K.B. 1765).
26. *Boyd*, 116 U.S. at 630 (emphasis added).

the two passages quoted above demonstrate, this reasoning was not an afterthought, it was the core of the Supreme Court's opinion. This is confirmed by another passage:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.* We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.[27]

The Court emphasized that its inquiry focused upon the question of whether use of illegally seized evidence was an independent violation of the Fourth Amendment:

> The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws–is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?[28]

The Court's answer in *Boyd* was clear: the *use* of unconstitutionally seized evidence against a citizen violated his constitutional rights.

Boyd is the Supreme Court's first opinion directly relying upon the Fourth Amendment to justify the implicit exclusion of evidence from use in a judicial proceeding. Nearly thirty years later, the Court leaned heavily upon *Boyd* when it expressly embraced the exclusionary rule in *Weeks v. United States*.[29] Law enforcers conducted warrantless searches and seizures that produced evidence, including various papers, incriminating Weeks in illegal gambling activities.[30] Weeks filed timely motions seeking the return of all of the property.[31] The Supreme Court agreed that the warrantless search of his home and seizure of his property was unconstitutional.[32] In explaining why the exclusionary remedy should

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27. *Id.* at 633-34 (emphasis added).
28. *Id.* at 622.
29. 232 U.S. 383 (1914).
30. *See id.* at 386.
31. *See id.* at 393.
32. *See id.* at 398.

be applied, the Court quoted extensively from earlier opinions, including *Boyd* and *Entick v. Carrington*,[33] and reached conclusions that echoed its 1886 opinion:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. *The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.*[34]

The Court once again concluded that the Fourth Amendment protects individual rights that are both fundamental and robust.[35] The opinion echoed *Boyd* by stressing that the Fourth Amendment not only proscribed the warrantless search of Weeks's home, but also use of the property seized in the criminal case against him.[36] Once again, the Justices emphasized that, although the Fourth Amendment binds all federal officials, the judiciary's particular charge is to preserve these fundamental rights against law enforcement efforts that would diminish them.[37] Among these was the individual's fundamental right not to have unlawfully seized evidence used against him in judicial proceedings:

> The case . . . involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence . . . . *If letters and private documents can*

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33. *See id.* at 389-91 (citing *Boyd*, 116 U.S. at 630; Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765)).
34. *Id.* at 391-92 (emphasis added).
35. *See id.* at 398.
36. *See id.* at 394.
37. *See id.* at 398-99.

> *thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.* The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[38]

The Court explicitly rejected the idea that Fourth Amendment remedies were directed at the investigating officers personally. Referring to the officers who carried out the illegal intrusions, the Supreme Court emphasized that *"[w]hat remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."*[39]

In other words, the Fourth Amendment enforces certain rights against the federal government that judges must enforce when they are raised in litigation between the citizen and the government, particularly in a criminal case. The courts must craft remedies for these violations that are directed at the federal government, because the government is bound to obey the Fourth Amendment's commands. The injured citizen may be able to pursue other remedies against the officers as individuals, including the traditional civil trespass suit for damages.[40] But within the criminal case brought by the government against a citizen, judges must craft remedies appropriate to that dispute.

Nearly half a century later, the Supreme Court decided *Mapp v. Ohio*,[41] the last of its seminal opinions embracing the exclusionary rule. The reader undoubtedly knows that this is the decision in which the Court imposed the exclusionary rule upon the states.[42] But the reader may not know, in light of the Court's subsequent opinions deploying the deterrence theory as a means of constricting the exclusionary rule, how much the Court's opinion in *Mapp* relied upon the reasoning in *Boyd* and *Weeks*.

Justice Clark's opinion in *Mapp* relied upon the reasoning of these earlier opinions, and quoted at length from their most expansive and eloquent passages defining the nature of Fourth and Fifth Amendment rights.[43] The *Mapp* Court emphasized the role of judicial review in preserving these powerful individual

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38. *Id.* at 393-94 (emphasis added).

39. *See id.* (emphasis added) (citing Twining v. New Jersey, 211 U.S. 78 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964); Boyd v. United States, 116 U.S. 616 (1886)). The Court thus distinguished a common law trespass action brought against the searchers from the constitutional remedy available to the defendant in a criminal prosecution.

40. *See* Cloud, *supra* note 5, at 254.

41. 367 U.S. 643 (1961).

42. *See id.* at 660.

43. *See Mapp*, 367 U.S. at 646-48.

rights, first by quoting from *Boyd*,[44] then by describing how the *Weeks* opinion embodied this kind of judicial review:

> In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional."[45]

The Court quoted at length from *Weeks*, reiterating the justifications for exclusion found in the Court's earlier opinions. The quoted language stressed the fundamental nature of Fourth Amendment rights, that the use of illegally seized evidence is an independent violation of constitutional rights, and that all officials of the federal government are obligated to respect Fourth Amendment rights.[46]

The Court also emphasized that the exclusionary rule is not a mere rule of evidence, but instead is an essential part of the Constitutional rights protected by the Fourth Amendment: "There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*–and its later paraphrase in *Wolf*–to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed."[47]

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44. *See id.* at 647 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.")).

45. *Id.* (citation omitted) (quoting *Boyd*, 116 U.S. at 638; I ANNALS OF CONG. 439 (Joseph Gales ed., 1789)).

46. *See id.* at 647-48. This discussion includes a reference to the deterrent possibilities of the exclusionary rule, but in the context of the entire passage, it is apparent that the Court's emphasis was upon the use of judicial review to preserve fundamental liberties and was likely using the term as a shorthand reference for effective, judicially controlled remedies. *See id.* Referring to its decision in *Weeks*, the Court wrote:

> This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required–even if judicially implied–deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts," and that such evidence "shall not be used at all."

Id. at 648 (citations omitted) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, 392 (1914)).

47. *See id.* at 649. The Court even found support for this reasoning in *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967), an opinion which had narrowed the scope of Fourth Amendment rights: "'The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment.'" *See Mapp*, 367 U.S. at 649 (quoting

Like its two predecessors, the *Mapp* opinion rested upon interrelated justifications: it treated Fourth Amendment rights as fundamental and advocated judicial review as a means of preserving those rights against improper encroachment.[48] Although the *Mapp* opinion did make passing references to the question of deterring government illegality, these marginal references differed from the kind of utilitarian calculus that prompts studies like the one that is the subject of this symposium.

For example, the *Mapp* opinion includes the following sentence: "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter–to compel respect for the constitutional guaranty in the only effectively available way–by removing the incentive to disregard it.'"[49] Taken out of context, this sentence appears to be at least consistent with the deterrence rationale. But, taken in context, this sentence lends little support to the notion that the Court was adopting a deterrence theory of the exclusionary rule. This sentence concludes a lengthy paragraph devoted to establishing that the exclusionary rule is an essential ingredient of the right to be free from unreasonable searches and seizures that the Court had previously held to be a fundamental right imposed upon the states by the Due Process Clause of the Fourteenth Amendment.[50] The *Mapp* opinion stressed that the fundamental rights held by individuals against encroachment by both federal and state officials were equivalent, and that both encompassed the prohibition against the use of illegally seized evidence:

> The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches–state or federal–it was logically and constitutionally necessary that the exclusion doctrine–an essential part of the right to privacy–be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[51]

Placed within this context, it appears that the passing reference to deterrence in the following sentence is nothing more than an afterthought, an additional argument tacked on in support of the central argument that the fundamental right under discussion was identical in both the federal and state systems. In this passage, the Court's real concern

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Olmstead, 277 U.S. at 462). Applying this broad principle, the Court held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *See id.* at 655.

48. *See id.* at 646-50.

49. *Mapp*, 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

50. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

51. *Mapp*, 367 U.S. at 655-56.

was justifying its decision to utilize the Fourteenth Amendment's Due Process Clause to impose fundamental rights upon the states. Federalism, not deterrence, was the issue, and in this instance, fundamental individual rights defeated weighty arguments favoring state autonomy that had prevailed only twelve years earlier in *Wolf v. Colorado*.[52] This interpretation is bolstered by the opinion's next passage, in which the Court confirms the linkage between the rights protected by the Fourth and Fifth Amendments it had first described in *Boyd* and *Weeks*:

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle." They express "supplementing phases of the same constitutional purpose–to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence–the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.[53]

Once again, the Court's primary justification for adopting the exclusionary rule is not that the remedy is a means of deterring government misbehavior; its justification is that citizens possess a fundamental constitutional right not to have unlawfully seized evidence used against them in judicial proceedings. The insignificance of the deterrence rationale is emphasized by the Court's handling of the most famous judicial criticism of the exclusionary rule, Cardozo's epigram about suppression permitting criminals to escape punishment. Obviously, Cardozo's criticism is correct; in some number of cases suppression will result in guilty people escaping punishment. But the Court did not counter his claim by arguing that exclusion was necessary to deter police misconduct. Instead, it accepted the criticism as accurate, then argued that fundamental constitutional values require the remedy:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration–the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead*: "Our government is the potent, the omnipresent teacher. For good or for

52. *Wolf*, 338 U.S. at 31-32.

53. *Mapp*, 367 U.S. at 656-57 (alteration in original) (citations omitted) (quoting Feldman v. United States, 322 U.S. 487, 489-90 (1944); Bram v. United States, 168 U.S. 532, 543-44 (1897)).

ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[54]

The Court concluded this passage by examining the effects of the exclusionary rule upon law enforcers. But even here, its focus was not upon deterring police misconduct. Rather, it addressed the issue of the nature of the burden the rule imposes upon police officers and expressly rejected the assumption that "the exclusionary rule fetters law enforcement."[55] As if to emphasize its lack of concern for the empirical dimensions of this issue, the Court was satisfied by the "pragmatic" evidence that federal officers had operated effectively during the half century since *Weeks* was decided.[56]

III. WHO SHOULD DETER POLICE MISCONDUCT? DOES THEORY MATTER?

Although *Mapp* ultimately relied upon rights-based reasoning taken from *Boyd* and *Weeks* to justify its theory of individual rights, it differed from these antecedents in one pivotal way. The earlier opinions had only affected federal law enforcers. By imposing the exclusionary rule on all state and local law enforcers, the Court abandoned its traditional approach to interpreting the relationship between the Fourteenth Amendment's Due Process Clause and the rights protected by the Bill of Rights.

The Court's traditional method required a fact sensitive, case by case analysis. For example, in the 1930s, the Court held that a citizen's right to due process was violated when a state convicted him of a capital crime although he did not receive effective assistance of counsel for his defense.[57] However, the Court did not

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54. *Id.* at 659 (alterations in original) (footnotes omitted) (citations omitted) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967); Elkins v. United States, 364 U.S. 206, 222 (1960); People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)). Two other elements of the quoted passage are relevant to this Article. First, Justice Brandeis's *Olmstead* dissent does not advocate suppression because its educational effects would deter government lawbreaking by educating the government's employees. Rather, Justice Brandeis emphasized the government's function as *teacher* and the lessons its conduct had for "the whole people." *See Olmstead*, 277 U.S. at 471-85 (Brandeis, J., dissenting). Second, the reference to judicial integrity does not seem to describe ethical or lawful behavior by individual government employees so much as it describes the need to preserve the structural integrity of the constitutional system. Taken in context, the reference to judicial integrity seems to encompass issues like the need for meaningful judicial review rather than the need for a code of government ethics. This passage is similar to Chief Justice Marshall's invocation of the inherent moral duty of judges to exercise that power in appropriate circumstances. Chief Justice Marshall concluded his exegesis of the nature of judicial review by writing:

> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

55. *See Mapp*, 367 U.S. at 659.

56. *See id.* at 660.

57. *See* Powell v. Alabama, 287 U.S. 45, 73 (1932).

impose a blanket Sixth Amendment rule requiring defense counsel in all criminal prosecutions.[58] Instead, it examined the specific facts of each subsequent case to see if the right asserted by that defendant in that case was so fundamental to the nature of a free society that actions by a state derogating the right violated the very notion of ordered liberty. According to this interpretive model, conduct that would violate some provision of the Bill of Rights if engaged in by the federal government did not necessarily violate due process standards if carried out by a state government.[59] This kind of case by case analysis tended to cede authority to the states, was consistent with theories of adjudication that focused upon the constitutional rights held by individual citizens, and kept the Supreme Court out of the business of prescribing rules of conduct for broad categories of state government actors. This was the "retail" application of constitutional theory.

Mapp, on the other hand, implemented constitutional rules in a "wholesale" manner. It is not news that this wholesale approach provoked criticism and opposition, in part because it conflicted with strongly held views about federalism. But a more subtle byproduct of the wholesale application of the exclusionary rule is relevant to this discussion. By announcing a uniform rule that regulated every police officer, in every city, in every state, and in every case, the decision smacked of administrative or legislative rule making rather than of judicial resolution of an individual dispute. This was a relatively subtle and indirect form of judicial rule making when compared with some of the Court's subsequent decisions. For example, *Mapp* did not announce a code of rules for police officers to follow in conducting custodial interrogations.[60] Nor did it establish a trimester-based schedule defining the extent of government power to regulate abortions.[61]

But *Mapp* had the effect of rule making, nonetheless. After *Mapp*, state judges and police officers were required to adhere to the Fourth Amendment rules enunciated by the Supreme Court in its various decisions. This uniform application of the Supreme Court's decisions–and the rules announced in them–ultimately put the Court in the uncomfortable position of establishing national standards for proper police practices. Perhaps it was inevitable that this would lead the Court and commentators to begin to focus upon how the Court's decisions affected police

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58. That did not happen for another 30 years. *See* Gideon v. Wainright, 372 U.S. 335, 345 (1963) (requiring appointed counsel for indigent defendants in felony cases).

59. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937) (holding that a state procedure permitting retrial of the defendant would have violated the Fifth Amendment's Double Jeopardy Clause, but did not violate the Fourteenth Amendment), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

60. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (setting forth rules of conduct for officers to follow in conducting a custodial interrogation).

61. *See* Roe v. Wade, 410 U.S. 113 (1973), *modified by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

behavior.

Many judges and commentators, including the authors of the Pepperdine Study, have noted that the Supreme Court's decisions in cases like *Mapp* have had the beneficial effect of educating police officers about the nature of constitutional rules.[62] Here I am concerned with a different byproduct of the *Mapp* decision. By putting the Court in the position of micromanaging the search and seizure practices of all police officers, *Mapp* helped shift the Court's analytical focus in these cases from examining claims of rights violations arising in individual cases to making sure that the police behaved properly in all cases. From there it was not much of a leap to begin asking how well the Court's decisions worked at deterring misconduct by the police.

The problem, of course, is that courts deciding individual cases are not particularly well-suited to the task of announcing codes of police practices. Police departments acting under the direction of the elected branches of government are responsible for training police officers. The burden of educating officers about constitutional rules (and myriad other issues) falls upon these departments–typically part of the executive branch–and not upon the judiciary. The task of managing police departments belongs within those departments, and with the elected officials responsible for them.

Conversely, it is axiomatic that the judicial function is to resolve disputes properly raised in litigation. Sometimes these disputes involve claims that an individual's constitutional rights were violated, and then the courts must deal with those individual claims.[63] But those claims properly arise within the context of litigated cases. The judicial task is to resolve the claims of the parties to the litigation, not to manage how executive branch departments train their employees.

The Court's decisions adopting the exclusionary rule in *Boyd* and *Weeks* properly eschewed the proposition that judges should undertake the task of deterring police misconduct. These opinions left this task where it belonged, within the elected branches of government. Instead, both opinions defined the nature of rights protected by the Constitution, determined that in each case government acts violated those rights, and employed the exclusionary rule to provide a remedy appropriate to the parties and issues involved in the litigation.[64] It is probably safe to assume that the Justices anticipated that these decisions might serve some educational function; that law makers and law enforcers alike would learn from the Court's opinions and try to conform their practices to them. But this was not the underlying justification for the Court's decisions adopting the exclusionary rule in federal cases.

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62. *See, e.g.*, Perrin et al., *supra* note 1, at 678.

63. Again, this is axiomatic in the tradition of constitutional judicial review. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

64. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 389-98 (1914); Boyd v. United States, 116 U.S. 616, 621-38 (1886).

In *Mapp* the Court also justified its decision as one deploying the exclusionary remedy to protect constitutional rights.[65] But by extending the Fourth Amendment exclusionary remedy to cover all state actors, the Court placed itself in a regulatory posture. The eventual effect was to de-emphasize the task of defining and protecting these rights, and to emphasize instead the task of defining appropriate police conduct. The stated purpose of the *Mapp* opinion was not to deter police misconduct, but its effect was to open the door, to make that argument available to critics of the exclusionary rule.

Fourth Amendment cases often demonstrate that theory does have practical consequences. The Court's shift from traditional theories that emphasized judicial review and individual constitutional rights to instrumentalist methods like interest balancing was in large part the product of a more fundamental change in legal theory. Beginning in the late 1960s, pragmatist legal theory replaced the rights-based theories that had dominated Fourth Amendment jurisprudence for nearly a century.[66] In practice, application of these pragmatist ideas in the Fourth Amendment context has produced judicial decisions generally deferential to government power. One product of that change in theory has been that Fourth Amendment rights frequently are treated as mere interests which are easily "outweighed" when balanced against the government's social policy arguments.[67] In disputes involving the exclusionary rule, the government often wins because the Court concludes that, given the facts and issues in the case, suppressing evidence will not deter police misconduct. This is true even if the search and seizure violated the explicit commands of the Constitution. In these cases, the choice of theory affects outcomes.

In *United States v. Leon*,[68] for example, the Supreme Court justified its decision adopting a "good faith" exception to the exclusionary rule in part because suppression in that case would not have any deterrent effect on the police.[69] From the perspective of deterrence theory, this analysis is unassailable because the case record revealed no police misconduct.[70] Before conducting searches and seizures in the case, law enforcement officers had engaged in a lengthy investigation and, after consulting with prosecutors, had obtained judicial warrants.[71]

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65. *See* Mapp v. Ohio, 367 U.S. 643, 659-60 (1961).

66. For detailed discussions of these developments in Fourth Amendment theory, see Cloud, *supra* note 13; Cloud, *supra* note 5.

67. *See, e.g.*, Cloud, *supra* note 5, at 226-47.

68. 468 U.S. 897 (1984).

69. *See id.* at 925-26.

70. *See id.* at 901-02.

71. *See id.*

The parties litigated the case before the Supreme Court on the premise that the warrants were issued despite the absence of probable cause–although the existence of probable cause was in fact a very close question.[72] The law enforcement officers had followed the dictates of the Fourth Amendment. The mistake was made by the judicial officer who issued the warrant when probable cause did not exist.[73] By presuming that the exclusionary rule is directed only at police officers, the Court could justify creating a "good faith" exception to the exclusionary rule.[74] There was no executive branch misconduct to deter, and the exclusionary rule is not intended, the majority asserted, to deter judicial misconduct.[75]

The Supreme Court's original theory of the exclusionary rule would produce a different outcome in *Leon* for two reasons. First, it would emphasize that the searches and seizures violated an express constitutional right. Nowhere is the Fourth Amendment's text more explicit than in requiring that warrants must be based upon probable cause. A warrant issued without probable cause violates that command, as do searches conducted pursuant to such a defective warrant. Second, the traditional theory relies upon judicial review to guarantee that these rights are not violated. According to this approach, the exclusionary rule was not intended to deter judicial misconduct, rather it simply requires that judges fulfill their constitutional functions. A judge's decision to issue warrants in the absence of probable cause triggers the constitutional remedy of exclusion–which was designed not to "deter" judges, but to enforce fundamental rights held by the people.

In many Fourth Amendment cases, both the rights based traditional theories and the contemporary pragmatist methods will produce the same outcomes. But in many cases, and *Leon* is a perfect example, the theory selected really does matter–it will determine how cases are decided.

IV. CONCLUSION

The Supreme Court's seminal decisions adopting the exclusionary rule deserve to be studied, if only because they articulate the traditional theory that the Fourth Amendment protects fundamental privacy, property, and liberty rights against government intrusions. These opinions justify suppression of evidence because it is the only remedy available to judges exercising the power of judicial review to protect these fundamental rights. These opinions may have had the effect of deterring police from engaging in conduct that violated the Fourth Amendment, but that was a byproduct, not a central justification for the rule.

I do not suggest that we can or should ignore the theories that currently dominate debate about the Fourth Amendment exclusionary rule. I do propose, however, that this debate is misguided. We do not need empirical studies to prove

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72. *See id.* at 905.
73. *See id.* at 901-02.
74. *See id.* at 922-23.
75. *See id.* at 920-21.

that the exclusionary rule is not the most efficient device for shaping police behavior. Of course it is not. Remedies aimed directly at officers who break the law–criminal prosecutions, civil damage suits, and administrative penalties–are rational methods for pursuing the goal of deterring misconduct. Undoubtedly, they are more likely to get the attention of individual officers than is the suppression of evidence in criminal prosecutions.

The problem, of course, is that no one seriously expects that those remedies will be rigorously enforced in any but the most egregious cases. This is true, in part, because enforcing those remedies is a task for other government actors, including police departments and prosecutors. It is not a task for judges, and it is not the reason Supreme Court Justices adopted the exclusionary rule in its seminal cases–*Boyd, Weeks, and Mapp.*

In none of these cases was deterrence of police misconduct offered as the fundamental justification for excluding evidence. Undoubtedly, the Justices recognized that suppression of illegally seized evidence might have the salutary side effects of educating police officers about the nature of constitutional rights and encouraging them to respect those rights. But education and deterrence were at most potential side effects of the exclusionary rule. Its fundamental purposes were to protect individual constitutional rights by effecting judicial review within the contours of criminal litigation brought by the government against individual citizens.

If we are serious about educating our law enforcers about what the Constitution permits and proscribes, we must acknowledge that this is primarily the responsibility of police departments, prosecutors, and their elected superiors in the executive branch. This is not the primary responsibility of judges, and it is not the primary function of the exclusionary rule.